Ho Weng Leong v Ng Kee Chin

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-254 OF 1991
ABDUL MALIK ISHAK J
12 FEBRUARY 1996

Civil Procedure *— Pleadings — Point of law — Oral undertaking to convert condition of demised premises not pleaded — Whether failure to plead oral undertaking fatal — Whether issue of conversion a point of law — Rules of the High Court 1980 O 18 r 11*

Contract *— Estoppel — Estoppel by conduct — When course of conduct amounts to representation — Whether defendant's own fault can sustain defence of estoppel*

Contract *— Frustration — Impossibility — Conversion of the condition of premises — Whether failure to obtain conversion rendered contract legally or physically impossible of performance — Contracts Act 1950 s 57(2)*

Contract *— Implied terms — When term to be implied in contract — Considerations*

Equity *— Defences — Estoppel — Estoppel by conduct — When course of conduct amounts to representation — Whether defendant's own fault can sustain defence of estoppel*

Evidence *— Parol evidence rule — Oral undertaking in addition to written contract — Whether oral evidence of undertaking admissible — Evidence Act 1950 s 92*

The defendant was the owner of a double storey semi-detached house ('the demised premises') which was rented out to the plaintiff for three years commencing from 1 June 1991. The plaintiff had paid RM158,000 to the defendant as advance rental and utilities deposits. The special conditions of the tenancy agreement stated that the plaintiff was to use the demised premises to carry on the business of karaoke, musical lounge and KTV. It was alleged that the defendant orally undertook to convert the condition of use of the demised premises from housing to business. The necessary conversion was not obtained and the plaintiff filed this claim for the return of the RM158,000 paid to the defendant, alleging that the defendant's failure to obtain the conversion had frustrated the tenancy agreement. The defendant argued that: (i) the oral undertaking was not pleaded in the statement of claim; (ii) the issue of conversion was absent from the tenancy agreement; and (iii) the plaintiff was estopped by conduct from saying that he refused to occupy the demised premises until the issue of conversion had been settled by the defendant.

Held, allowing the plaintiffs claim:

(1) Order 18 r 11 of the Rules of the High Court 1980 ('the RHC') makes it clear that it is not mandatory to raise a point of law. The defendant's oral undertaking to convert the condition of the demised premises from housing to business revolved on the issue of conversion which was a point of law. That being the case, it

was not mandatory to mention it in the plaintiff's statement of claim and the failure of the plaintiff to do so must not be held against him (see p 148C–E); *Nicholl v Allen* (1862) 31 LJQB 283 and *Cooper v Hall* [1968] 1 WLR 360 followed.

(2) Any bystander having sight of the tenancy agreement would simply react that the defendant, as an implied term of the contract, should obtain the relevant approval for conversion of the demised premises from housing to business. The circumstances of the case demand that the term specified be implied in the contract (see p 149F); *Yong Ung Kai v Enting* [1965] 2 MLJ 98 followed.

(3) Because of the failure of the defendant to obtain the necessary conversion, the tenancy agreement became impossible to perform. A contract is said to be frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance (see p 149G); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 followed.

(4) Section 92 of the Evidence Act 1950 merely prescribes a rule of evidence and it does not fetter the power of the court to arrive at the true meaning and effect of the tenancy agreement by taking into account the surrounding facts and circumstances of the case (see p 150H).

(5) The question of whether a course of conduct amounts to a representation and which representation is meant to be acted upon in a certain way must vary according to the facts of each particular case and no general rules can be laid down for it (see p 151H). The defendant was at fault in not resolving the issue of conversion and he therefore cannot take advantage of an error to which he himself has contributed (see p152C); *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261 followed.

[Bahasa Malaysia summary

Defendan adalah pemunya sebuah rumah dua tingkat berkembar dua ('premis yang didemis') yang telah disewa kepada plaintif untuk tiga tahun bermula dari 1 June 1991. Plaintif telah membayar RM158,000 kepada defendan sebagai sewa pendahuluan dan deposit utiliti. Syarat-syarat khas perjanjian penyewaan itu menyatakan bahawa plaintif akan menggunakan premis yang didemis untuk menjalankan perniagaan karaoke, bilik muzik dan KTV. Ianya telah dikatakan bahawa defendan telah mengakujanji secara lisan untuk menukar syarat penggunaan premis yang didemis daripada perumahan kepada perniagaan. Penukaran yang diperlukan itu telah tidak didapati dan plaintif memfailkan tuntutan ini untuk pengembalian RM158,000 yang telah dibayar kepada defendan, dengan mengatakan bahawa kegagalan defendan untuk mendapatkan penukaran telah mengecewakan perjanjian penyewaan itu. Defendan telah berhujah bahawa: (i) akujanji lisan itu telah tidak diplid di dalam pernyataan

tuntutan; (ii) isu penukaran tidak terdapat di dalam perjanjian penyewaan; dan (iii) plaintif adalah diestop melalui perbuatan daripada mengatakan bahawa beliau telah enggan menduduki premis yang didemis sehingga isu penukaran telah diselesaikan oleh defendan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Aturan 18 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menjadikannya jelas bahawa adalah tidak mandatori untuk menimbulkan perkara undang-undang. Akujanji secara lisan oleh defendan untuk menukar syarat premis yang didemis daripada perumahan kepada perniagaan berputar atas isu penukaran yang adalah satu perkara undang-undang. Oleh yang demikian, adalah tidak mandatori untuk menyebut perkara itu di dalam pernyataan tuntutan plaintif dan kegagalan plaintif untuk berbuat demikian tidak seharusnya diputuskan terhadap beliau (lihat ms 148C–E); *Nicholl v Allen* (1862) 31 LJQB 283 dan *Cooper v Hall* [1968] 1 WLR 360 diikut.

(2) Mana-mana orang yang berdiri keliling yang dapat melihat perjanjian penyewaan itu akan memberi reaksi bahawa defendan, sebagai suatu terma tersirat kontrak, patut mendapat kelulusan relevan untuk penukaran premis yang didemis daripada perumahan kepada perniagaan. Hal-hal keadaan kes mendesak bahawa terma yang ditetapkan itu dijadikan terma tersirat di dalam kontrak (lihat ms 149F); *Yong Ung Kai v Enting* [1965] 2 MLJ 98 diikut.

(3) Oleh kerana kegagalan defendan untuk memperolehi penukaran yang diperlukan, perjanjian penyewaan itu telah menjadi mustahil untuk dilaksanakan. Suatu kontrak dikatakan terkecewa apabila terdapat satu perubahan di dalam hal-hal keadaan yang menjadikan kontrak itu mustahil untuk dilaksanakan sama ada di sisi undang-undang ataupun secara fizikal (lihat ms 149G); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 diikut.

(4) Seksyen 92 Akta Keterangan 1950 hanya menetapkan suatu rukun keterangan dan ianya tidak membelenggu kuasa mahkamah untuk sampai kepada maksud dan kesan sebenar perjanjian penyewaan itu dengan mengambilkira fakta-fakta serta hal-hal keadaan sekeliling kes (lihat ms 150H).

(5) Soalan sama ada suatu perjalanan tindakan adalah merupakan suatu representasi, maksud representasi yang mana adalah supaya seseorang bertindak menurutnya dalam cara tertentu, mesti berubah menurut fakta-fakta tiap-tiap kes tertentu dan tiada rukun-rukun am boleh dibentangkan untuknya (lihat ms 151H). Defendan adalah bersalah kerana tidak menyelesaikan isu penukaran dan oleh itu, beliau tidak boleh mengambil kesempatan suatu kesilapan kepada mana beliau telah menyumbang (lihat ms 152C); *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261 diikut.]

[*Editorial Note*: The defendant has filed an appeal to the Court of Appeal.]

Notes

For cases on frustrated contracts due to impossibility of performance, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1613–1617.
For cases on estoppel by conduct, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1543; 6 *Mallal's Digest* (4th Ed) paras 1456–1457.
For cases on the parol evidence rule and oral evidence of variation or modification, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1243–1247.

Cases referred to

Bernety v Tronoh Mines Ltd [1949] MLJ 4
Bruce v Odhams Press Ltd [1936] 1 KB 697
Chandler v Webster [1904] 1 KB 493
Chan Buck Kia v Naga Shipping & Trading Co Ltd [1963] MLJ 159
Cooper v Hall [1968] 1 WLR 360
Edwards v Aberayron Mutual Ship Insurance Society Ltd (1876) 1 QBD 562
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32
Govindram Seksaria & Anor v Edward Radbone [1947] IA 285
Hirji Mulji & Ors v Cheong Yue Steamship Co Ltd [1926] AC 497
Jones v Bangor Mutual Shipping Insurance Society (1889) 61 LT 727
Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154
Kung Swee Heng &Anor v Paritam Kaur [1948] MLJ 170
Maclaine & Ors v Gatty & Anor [1921] 1 AC 376
Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524
Menaka v Lum Kum Chum [1977] 1 MLJ 91
Murugesan v Krishnasamy & Anor [1958] MLJ 92
Nicholl v Allen (1862) 31 LJQB 283
North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd [1913] 3 KB 422
Oakland Metal Co Ltd v D Benaim & Co Ltd [1953] 2 QB 261
Ong & Co Pte Ltd v Foo Sae Heng [1990] 2 MLJ 85
Palmer v Palmer [1892] 1 QB 319
Philipps v Philipps & Ors (1878) 4 QBD 127
Ramli bin Zakaria & Ors v Government of Malaysia [1982] 2 MLJ 257
West Rand Central Gold Mining Co Ltd v R [1905] 2 KB 391
Yong Ung Kai v Enting [1965] 2 MLJ 98

Legislation referred to

Contracts Act 1950 ss 57(1), (2), (3), 66
Evidence Act 1950 s 92
Rules of the High Court 1980 O 18 rr 7(1), 11

A *Abdul Razak Ahmad* (*Abdul Razak Ahmad & Associates*) for the plaintiff. *Mohamed Hanipa bin Maidin* (*LParthiban & Associates*) for the defendant.

Abdul Malik Ishak J: The evidence as unfolded in the course of the trial is quite simple and straightforward. It was not disputed that the defendant was the owner of a double storey semi-detached house at No 182, Jalan Dato' Suleiman, Taman Century, 80250 Johor Bahru (hereinafter referred to as 'the demised premises'). It was also not disputed that the demised premises was rented by the plaintiff for a period of three years commencing from 1 June 1991 at RM17,000 per month as reflected in the tenancy agreement at pp 2 to 14 of 'IDP'. In the course of the trial, the defendant agreed that he had received RM158,000 from the plaintiff which comprised of:

(a)	Rentals in advance for the months of July to October totalling	RM	68,000
(b)	Deposit security	RM	85,000
(c)	Electricity and water deposits	RM	5,000
	Total	RM	158,000

Though the tenancy agreement was not happily worded, yet cl 3(e) allows the plaintiff, inter alia, 'to use the demised premises only for business residential purposes.' Paragraph 13 of the special conditions to the tenancy agreement averted to the nature of the business to be conducted by the plaintiff on the demised premises and for brevity it is reproduced hereinunder:

> 13 The Tenant shall use the demised premises to carry on business of karaoke, musical lounge and KTV and [is] expressly prohibited or restricted from carrying on any business similar to that of the Landlord and in particular [the] operation of [a] motel except that [if] the application for karaoke, musical lounge and KTV is rejected by (the) Relevant Authority, the Landlord shall consent the Tenant to operate [a] motel under (the) same terms and conditions.

In the words of the plaintiff under examination-in-chief, his intended business on the demised premises were:

> Perniagaan saya khusus untuk karaoke musical lounge dan KTV. Maksud KTV ialah bilik-bilik berasingan untuk orang ramai menyanyi karaoke. Keistimewaan nyanyian karaoke adalah melalui sound system dan mempunyai latar belakang music untuk orang menyanyi dan kesemua ini tidak terdapat di rumah.

Later under cross-examination, the plaintiff elaborated further:

> Lounge yang saya berniaga adalah sebuah musical lounge. Pelanggan saya dapat menikmati lagu dan juga dapat waitress iaitu services of a waitress. Berkenaan karaoke ianya mempunyai kamar yang berlainan iaitu bilik-bilik berlainan. Setiap bilik mempunyai alat-alat menyanyi dan satu karaoke set. Pelanggan karaoke dapat menyanyi dalam bilik ini. Sekiranya pelanggan ingin dapat perkhidmatan waitresses juga boleh buat tempahan. Tetapi di dalam

kamar tidak terdapat katil; untuk karaoke ada empat attractions. Pertama, waitresses. Kedua, lagu lebih di karaoke. Ketiga, better musical instrument. Keempat, ada bilik.

The defendant denied under cross-examination that he did ask the plaintiff the nature of the plaintiff's business that the plaintiff planned to conduct on the demised premises. Later when the defendant was confronted with para 13 of the tenancy agreement as reproduced in the early part of this judgment, the defendant relented and unabashedly admitted that there were discussions between himself and the plaintiff and arising out of those discussions the defendant came to know that the plaintiff intended to conduct karaoke, musical lounge and KTV businesses on the demised premises. Under cross-examination, it was revealed that the defendant had purchased the house next door to the demised premises and that house bore the number 184 (hereinafter referred to as 'house No 184'). The defendant stated that both the demised premises and house No 184 were originally two single storey semi-detached houses and upon approval by the Majlis Perbandaran Johor Bahru ('MPJB'), the defendant proceeded to demolish and build two double storey semi-detached houses on the same site. The defendant admitted that on both the demised premises and house No 184, he had built extensions incorporating therein 20 rooms for purposes of rental. The defendant admitted that in 1991 he conducted a business in house No 184 using the name of 'Star Inn' as reflected in exh T3 of IDPT.

Incidentally, it is instructive to note that exh T3 of IDPT is a document from the Ministry of Trade and Industry itemizing details of Star Inn being registered in the name of the defendant with its place of business in house No 184. At this juncture, I hesitate to note and wonder as to why the relevant authorities would simply register Star Inn as a business venture of the defendant without checking whether house No 184 was a shophouse or a residential house. Star Inn was registered with the explicit purpose of conducting businesses in the following fields: 'Bed, Lodging, Breakfast, Service Agency, Trading Technician and Machineries.' Be that as it may, the defendant admitted that no one gave him permission to conduct business in house No 184 and he agreed that house No 184 is a residential house. The defendant admitted that he was summoned for those extensions and renovations by MPJB and he had paid the compound imposed on him. The defendant further admitted that he did not apply to '*ubah syarat*' house No 184 before he conducted his business there.

Reverting back to the demised premises, the defendant's experience with MPJB with regard to house No 184 should have put him in good stead when he rented out the demised premises to the plaintiff. One would have thought that the defendant would draw from his past experience in order to avoid coming into conflict with MPJB. But alas, the defendant adopted a nonchalant attitude when he rented out the demised premises to the plaintiff without applying to the land office to '*ubah syarat*' the demised premises. The defendant knew that without obtaining the '*ubah syarat*' to the demised premises he had gone against the law when he rented out the demised premises to the plaintiff.

A The evidence makes for interesting reading. It was put to the defendant that he had gone against the law and the defendant replied:

> I rent to him (referring to the plaintiff) according to his wish. I know I go against the law.

B Under cross-examination, a question was posed to the defendant and it runs like this:

> Soalan: Awak beritahu plaintiff sebelum jalankan perniagaan, awak perlu dapat ubah syarat?
>
> Jawapan: Saya beritahu plaintif rumah ini rumah kediaman dan terpulang kepada plaintif apa juga jenis perniagaan yang dia hendak buat.
>
> C Kami tidak bincang soal ubah syarat.

The plaintiff, on the other hand, testified that he did not conduct his business at the demised premises after signing the tenancy agreement because the defendant failed to convert the condition to the demised premises from housing to business. The blunt truth was conveyed to the D plaintiff's solicitors by MPJB in a letter dated 7 October 1991 as exhibited at p 15 of IDP. That letter reads as follows:

> Tetuan Abdul Razak Ahmad, 7hb Okt 1991
> Peguambela & Peguamcara,
> Tingkat 5,
> E Bangunan Malayan Banking,
> Jalan Selat Tebrau,
> 80000 Johor Bahru,
> Negeri Johor Darul Ta'zim.
>
> Tuan,
>
> F PER: PERMOHONAN MENJALANKAN PERNIAGAAN LOUNGE/ KARAOKE DI NO 182, JALAN DATO' SULEIMAN, TAMAN CENTURY, JOHOR BAHRU.
>
> Berhubong dengan perkara di atas, adalah di maklumkan bahawa bangunan No 182, Jalan Dato' Suleiman, Taman Century, Johor Bahru, adalah bangunan kediaman. Bangunan rumah kediaman tidak boleh digunakan
> G untuk menjalankan perniagaan Karaoke dan Muzik Lounge.
>
> Sekian dimaklumkan, terima kasih.
>
> 'BERKHIDMAT UNTUK NEGARA'
>
> Saya yang menurut perintah,
> —tt—
> H (Ketua Penolong Setiausaha)
> bp Timbalan Yang Dipertua,
> Majlis Perbandaran Johor Bahru.
>
> sk
>
> Encik Ho Weng Leong,
> I No 9, Tingkat 13, Blok A,
> Jalan Lumba Kuda,
> 80300 Johor Bahru,
> Negeri Johor Darul Ta'zim.

In strong language, MPJB sent another letter to the same solicitor dated 28 December 1991 as reflected at p 16 of IDP in the following terms:

> Berhubong dengan surat tuan yang bertarikh 22 Disember 1991, dimaklumkan bahawa bangunan No 182, Jalan Dato' Suleiman, Taman Century, Johor Bahru adalah rumah kediaman. Oleh yang demikian semua bentuk perniagaan termasuk 'Motel' tidak boleh dijalankan di bangunan yang tersebut.
>
> 2 Tindakan undang-undang akan diambil ke atas sesiapa yang menjalankan perniagaan di bangunan tersebut.
>
> Sekian, terima kasih.
>
> Saya yang menurut perintah,
> —tt—
> (Ketua Penolong Setiausaha)
> Majlis Perbandaran,
> Johor Bahru.

As if to add mileage to these two letters, the plaintiff put to the stand Abdul Rahman bin Abdullah (PW2 — 'Rahman'), the legal assistant with MPJB. Rahman emphatically stated that businesses cannot be conducted in residential houses like the demised premises in question. In explicit terms Rahman testified that:

> Bangunan yang boleh digunakan untuk perniagaan adalah bangunan yang telah ditetapkan sebagai tempat perniagaan. Jika No 182, Jalan Dato' Suleiman ingin digunakan sebagai tempat perniagaan, tuanpunya perlu buat permohonan di Pejabat Tanah untuk ubah syarat tanah jadi premis perniagaan. Sudah ubah syarat kepada perniagaan baru Majlis Perbandaran Johor Bahru keluarkan lesen untuk berniaga.

Under cross-examination Rahman repeated the same version that:

> Biasanya tuan tanah yang memohon untuk ubah syarat. Orang lain tidak boleh berbuat demikian.

So much for the evidence adduced during the trial.

Mr Mohamed Hanipa bin Maidin, the learned counsel for the defendant, put forth an argument that is worth repeating. He submitted that the defendant's oral undertaking as averted to by the plaintiff and Poh Teng Hong (PW3) to the effect that the defendant would convert the condition to the demised premises from housing to business must be a material fact in favour of the plaintiff and, consequently, it should be pleaded in the statement of claim. Since it was not pleaded, it was submitted that that was fatal to the plaintiff's case. There is nothing novel to the submission of Mr Mohamed Hanipa on this point. Lord Alverstone CJ, in *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391 at p 399 was of the view that all those salient facts must be pleaded which must, not may, amount to a cause of action. Scott LJ, in *Bruce v Odhams Press Ltd* [1936] 1 KB 697 (CA) at p 712 in the same vein said:

> The cardinal provision in r 4 [now r 7 (1)] is that the statement of claim must state the material facts. The word 'material' means necessary for the

> purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out' under O XXV r 4 ....

On the same point, Cotton LJ, said in *Philipps v Philipps & Ors* (1878) 4 QBD 127 at pp 138 and 139:

> The statement of claim, of necessity, must set out all the facts material to prevent the defendant being taken by surprise, because it is the first pleading, and that which ought to be referred to for the purpose of seeing whether there is a cause of action.
>
> ... in my opinion, it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

Brett LJ, in *Philipps v Philipps* (supra) adopted the stand that a party will not be entitled to give any evidence at the trial of any relevant facts which he has not pleaded. This was how he put it at pp 133 and 134:

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial ... any fact which is not stated in the pleadings. Therefore, again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim.

Farwell LJ, in *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 at p 425 said that every pleading must contain only a statement of the material facts on which the party pleading relies and not the evidence by which they are to be proved.

Brett LJ, in cautious terms said in *Philipps v Philipps* (supra) especially at pp 132 to 133:

> I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. I know that great pains were taken to draw r 4 [now r 7(1)] and it is difficult to state the matter more clearly than in that rule. The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they (that is, those material facts) are to be proved. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle CJ, expressed it is this way. He said that there were facts that might be called the allegata probanda, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle CJ, that r 4 [now r 7(1)] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies.

All said and done, the question whether any fact is or is not material to be pleaded depends mainly on the special circumstances of the particular case. There is no hard and fast rule. However, according to the particular circumstances of a case, it may be material to plead knowledge, intention, other condition of mind, motive and in some cases it may be necessary to give details as to time, place or pedigree, though as a rule the precise

wording of a document or conversation may not be material. See for instance *Palmer v Palmer* [1892] 1 QB 319.

Order 18 r 7(1) of the Rules of the High Court 1980 ('the RHC') states as follows:

> Subject to the provisions of this rule and rr 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

From a plain reading of O 18 r 7(1) of the RHC it can be said that a pleading must state the facts and not the law. In fact, O 18 r 11 of the RHC makes it clearer that it is not mandatory to raise a point of law when it employs these words:

> A party may by his pleading raise any point of law.

It is pertinent to mention here that in ordinary usage, the word 'may' is permissive and in a statute it will not generally be held to be mandatory: *Nicholl v Allen* (1862) 31 LJQB 283; *Cooper v Hall* [1968] 1 WLR 360.

Now, the defendant's oral undertaking to convert the condition of the demised premises from housing to business revolves on the issue of conversion which is a point of law. That being the case, it is my judgment that it is not mandatory to mention it in the plaintiff's statement of claim and the failure of the plaintiff to do so must not be held against him.

This brings me to the next issue which was raised by Mr Mohamed Hanipa and that is in regard to the absence of the issue of conversion in the tenancy agreement. Mr Abdul Razak Ahmad, the learned counsel for the plaintiff, took the stand that it was an implied term of the contract that the performance was subject to the obtaining of the necessary conversion of the condition of the demised premises from housing to business by the defendant. Even Rahman testified that the issue of conversation was the responsibility of the defendant to handle at the land office and once the demised premises has been converted from housing to business the MPJB will issue the licence for the business that is to be undertaken there. In *Yong Ung Kai v Enting* [1965] 2 MLJ 98, McGilligan J had occasion to consider the question of an implied term in relation to a written agreement between the parties there. The brief facts of that case were that the defendant entered into a written agreement with the plaintiff for the sale of timber on land in which a tribe had communal customary rights. In order to cut the timber, a licence from the forests department was required. The written agreement between the parties did not refer to the necessity of obtaining a licence. The defendant did his best to get a licence but this was refused. On a claim for breach of contract it was held, firstly, that there was an implied term that the sale of the timber was to be subject to the obtaining of the necessary licence and, secondly, as the licence was refused the contract became impossible to perform because of frustration and the plaintiff was therefore entitled to the return of moneys advanced by him to

A the defendant under the terms of the agreement. His Lordship McGilligan J in the course of delivering his judgment had this to say (at p 99):

> I hold that it was an implied term of the contract between them that performance was subject to the obtaining of any necessary licence and any necessary permission by the defendant. The courts do not, I know, lightly imply terms, but in my opinion the circumstances of this case demand that the term I have just specified be implied in this contract. It must have been in the minds of the parties that the agreement required the obtaining of a licence and of permission (if that in fact was necessary). MacKinnon LJ in the case of *Shirlaw v Southern Foundries (1928) Ltd* [1938] 2 KB 227 said:
>
> > 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"
>
> Here I believe that, if some bystander at the making of their agreement had said 'Don't forget about the licence and permission you have to get' the parties would have replied, in effect, 'Of course not! We know'.

From the available evidence, the defendant here did not obtain nor attempt to obtain the conversion of the demised premises from housing to business and this is the sharp contrasting factor with the facts of *Yong Ung Kai v Enting* (supra) where the defendant there did his level best to get whatever licence or permission that was necessary but failed to do so because of the refusal by the forests department. On the other hand, the plaintiff here, anxious to start his business at the demised premises, had through his solicitors enquired of MPJB as to the possibility of him conducting his karaoke and business lounge there. Unfortunately, MPJB refused to give the green light. Any bystander having sight of the tenancy agreement would simply react that the defendant here, as an implied term of the contract, should obtain the relevant approval for conversion of the demised premises from housing to business. To borrow the words of McGilligan J in *Yong Ung Kai v Enting* (supra) 'the circumstances of this case demand that the term I have just specified be implied in this contract.'

It is abundantly clear from the available evidence and it is my judgment that because of the failure of the defendant to obtain the necessary conversion, the tenancy agreement became impossible to perform and it has not, at all, been performed. It is now trite law that a contract is said to be frustrated when there is a change in the circumstances which renders a contract legally or physically impossible of performance. The House of Lords in the case of *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154 stated that the doctrine of frustration 'is only a special case of the discharge of contracts by an impossibility of performance arising after the contract was made.' The doctrine of frustration has since found its way into the statute book. Section 57(2) of the Contracts Act 1950 states the doctrine in this fashion:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Unfortunately the Contracts Act 1950 does not define the word 'impossible'. But what is clear is that the frustration should be supervening and subsequent to the formation of the contract. It must relate to some event which the promisor could not prevent from happening. However, a 'self-induced frustration' does not discharge a party of his contractual obligations: *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 as applied by the then Federal Court in *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257. It is clear that when a contract is discharged by frustration, the contract is said to have come to an end: *Hirji Mulji & Ors v Cheong Yue Steamship Co Ltd* [1926] AC 497 as cited in the local case of *Berney v Tronoh Mines Ltd* [1949] MLJ 4. Section 57(1) of the Contracts Act 1950 enacts that: 'An agreement to do an act impossible in itself is void.' Section 57(2) of the Contracts Act 1950 too states that such a contract 'becomes void'. At common law, the effect of frustration would be to release the parties to a contract of any future obligations but leaving intact any legal rights already accrued or money paid: *Chandler v Webster* [1904] 1 KB 493; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; and *Kung Swee Heng & Anor v Paritam Kaur* [1948] MLJ 170. Restitutionary remedies are also provided under ss 57(3) and 66 of the Contracts Act 1950. See *Govindram Seksaria & Anor v Edward Radbone* [1947] IA 285; *Murugesan v Krishnasamy & Anor* [1958] MLJ 92 and *Menaka v Lum Kum Chum* [1977] 1 MLJ 91. In the final analysis in order to determine the effect of frustration, one must take stock of the intention of the parties as construed from the terms of the contract itself without having to go elsewhere (*Chan Buck Kia v Naga Shipping & Trading Co Ltd* [1963] MLJ 159). On reflection, I cannot help but feel constrained to say that the doctrine of frustration is exhaustively covered by the Contracts Act 1950 and the need to refer to the common law may be minimal and drastically reduced in the future. Be that as it may, since the tenancy agreement in the present case is void, and I so hold it to be so, the plaintiff is entitled to recover back RM158,000 from the defendant forthwith. The defendant is bound under s 66 of the Contracts Act 1950 to restore that sum to the plaintiff and I so make that order accordingly.

It was next argued that the issue of conversion as alluded to in the early part of this judgment arose when the plaintiff took to the stand and testified for the first time on that point. This was said to run counter to s 92 of the Evidence Act 1950. With respect, there is no merit to this argument. I have held earlier that the issue of conversion was an implied term of the tenancy agreement between the parties and for the reasons alluded to somewhere in this judgment, the tenancy agreement became impossible of performance and, indeed, it was not performed at all. I venture to say that s 92 of the Evidence Act 1950 merely prescribes a rule of evidence and it does not fetter the power of the court to arrive at the true meaning and effect of the tenancy agreement by taking into account the surrounding facts and circumstances of the case. I would be failing in my duty if I do not take into account the whole scenario of the facts and circumstances of the case in perspective through the accounts of the witnesses produced at this trial.

Lest I be accused of an oversight, there is one other matter that demands attention. It is this. It was vigorously argued that there was an estoppel by conduct when the plaintiff paid the rentals in advance for the months of July to October 1991 totalling RM68,000. It was also impressed upon me that the plaintiff had not only registered a company known as Galaxy Laser Karaoke Deluxe Lounge on the demised premises but had also opened an account with Oversea-Chinese Banking Corporation Ltd ('OCBC') in that name (exh T2 of IDPT). These facts together with the fixing of the black canvas on the demised premises in order to decorate the same by the plaintiff were said to be reflective of an estoppel by conduct that should be construed against the plaintiff. It was submitted that on these set of facts the plaintiff was estopped by conduct from saying that he refused to occupy the demised premises until the issue of conversion had been settled by the defendant. Reliance was placed on the case of *Ong & Co Pte Ltd v Foo Sae Heng* [1990] 2 MLJ 85 a decision of the High Court of Singapore where Chao Hick Tin JC said (at p 86):

> As regards the third point, what the defendant alleged was again totally devoid of merit. The debit notes on the shares in question (for which a sum of S$57,829.07 was owed by the defendant) were sent to the defendant in the usual manner. The defendant had not denied that he received the debit notes. If in fact the purchases were contrary to instructions, one would expect an immediate protest by him. There was none. The defendant tried to make an issue of the fact that the remisier through whom the defendant dealt with did not file any affidavit. I did not think that was necessary, bearing in mind that all the transactions were documented. I would imagine that over the years a remisier must have dealt with hundreds of clients and entered into thousands of transactions on their behalf. The remisier could not conceivably say anything more than what were in the documents. The defendant had the effrontery to contend that he was under no duty to object to any of the documents sent to him. In my view, by not objecting, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.

But the facts in *Ong & Co Pte Ltd v Foo Sae Heng* (supra) are poles apart from the present case. There it concerned the defendant who had executed a memorandum of deposit in favour of the plaintiffs in order to obtain facilities from the plaintiffs to deal in stocks and shares on the Singapore Stock Exchange. One must not forget that the question of whether a course of conduct amounts to a representation and which representation is meant to be acted upon in a certain way must vary according to the facts of each particular case, and no general rules can be laid down for it. Thus, in *Edwards v Aberayron Mutual Ship Insurance Society Ltd* (1876) 1 QBD 563 and *Jones v Bangor Mutual Shipping Insurance Society* (1889) 61 LT 727 where persons, after accepting freight on goods shipped under bills of lading in their printed forms, were estopped from saying that the ship was not theirs, that the master was not their agent and that the contract was not with them. Whereas in *Maclaine & Ors v Gatty & Anor* [1921] 1 AC 376 (HL) the creditor who, under an agreement to accept interest at a lower rate on punctual payment, had on one occasion accepted interest at the lower rate after the agreed date, was not estopped from insisting on his

right to have payment at the higher rate on a subsequent failure to make punctual payment. Applying *Maclaine v Gatty* (supra), the plaintiff here was not estopped from insisting that the defendant fulfilled the implied condition to the tenancy agreement by obtaining the permission from the land office to convert the demised premises from housing to business even though the plaintiff:

(1) had paid the rentals in advance;

(2) had opened an account with OCBC under the name of Galaxy Laser Karaoke Deluxe Lounge; and

(3) was in the process of decorating the demised premises.

It was next to impossible for the plaintiff to conduct his business on the demised premises in view of the sanctions by MPJB. The defendant was at fault in not resolving the issue of conversion and he cannot therefore take advantage of an error to which he himself has contributed (by way of an analogy see the case of *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261).

For the reasons adumbrated above, I entered judgment for the plaintiff with costs. I ordered that the defendant restore RM158,000 to the plaintiff and the defendant was also ordered to incur interest at 8% per month from the date of the writ to the date of settlement.

Plaintiff's claim allowed.

Reported by Ng Kian Pin